



Civil and Administrative Tribunal  
New South Wales

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Case Name: The Owners – Strata Plan No 79749 v Dunstan

Medium Neutral Citation: [2022] NSWCATAP 262

Hearing Date(s): On the papers

Date of Orders: 9 August 2022

Decision Date: 9 August 2022

Jurisdiction: Appeal Panel

Before: Dr R Dubler SC, Senior Member  
D Ziegler, Senior Member

Decision: (1) A hearing on the question of costs is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).  
(2) The Respondents’ application for costs is dismissed.

Catchwords: COSTS – application for costs against a non-party – Tribunal has power to order a non-party to pay costs - whether special circumstances exist – the evidence and circumstances fail to demonstrate special circumstances warranting a costs order against the non-party

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)  
Civil Procedure Act 2005 (NSW)  
NCAT Guideline - Internal Appeals June 2022

Cases Cited: The Owners – Strata Plan No 74835 v Pullicin (Costs) [2020] NSWCATAP 49  
Moallem v Consumer Trader & Tenancy Tribunal (No2) [2014] NSWSC 1027  
The Owners – Strata Plan 2010 v Khan [2022] NSWCATAP 9  
Xabregas v Owners - Strata Plan No 79205

Texts Cited: None cited

Category: Costs

Parties: The Owners- Strata Plan No 79749 (Appellant)  
Ian Lawrence Dunstan (First Respondent)  
Kristine Margaret Dunstan (Second Respondent)

Representation: Counsel  
WDM Buckland (Respondents)

Solicitors  
No Submissions from Appellant  
O'Connor Harris & Co (Respondents)

File Number(s): 2022/00121853

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 19 April 2022

Before: A Nightingale, General Member

File Number(s): SC 21/36434

## **REASONS FOR DECISION**

### **Introduction**

- 1 Mr Rory McCrudden signed and lodged the Notice of Appeal the subject of these proceedings purportedly on behalf of the Owners Corporation (the Appellant).
- 2 On 28 April 2022, the Appeal Panel directed that the issue of the standing of Mr McCrudden to sign the Notice of Appeal should be the subject of evidence and submissions to be lodged on or before 9 May 2022.
- 3 On 24 May 2022, the appeal was withdrawn and dismissed.

4 The Respondents applied for their costs of the appeal. The Respondents sought their costs of the appeal from Mr McCrudden personally on the basis that Mr McCrudden had no standing or authority to sign the Notice of Appeal.

5 This is our decision on the Respondents' application for costs.

### **Background**

6 On 19 April 2022, the Tribunal below made the following orders on the application of the Respondents:

89 An order under s 237(1)(a) of the *Strata Schemes Management Act 2015* appointing Realise Consulting Pty Ltd t/as Sydney Strata Specialists as the compulsory strata manager for the Owners- Strata Plan No 79749 from the date of this order for a period of 12 months.

90 Realise Consulting Pty Ltd t/as Sydney Strata Specialists may exercise all of the functions of the Owners Corporation and all the functions of the chairperson, secretary, treasurer and strata committee pursuant to s 237(1)(a) of the SSMA on the terms and conditions set out in the agency agreement forming part of the bundle marked Applicant's documents (1), relied upon by the applicant in these proceedings.

7 Mr McCrudden is the secretary of the Appellant.

8 On 27 April 2022, Mr McCrudden lodged the Notice of Appeal purportedly on behalf of the Appellant, the Owners Corporation – SP 79749. The Notice stated in respect of representation, 'solicitor to be appointed'.

9 On 27 April 2022, Mr McCrudden also lodged an application for a stay of the orders at first instance pending appeal, purportedly on behalf of the Appellant.

10 On 28 April 2022, the following two orders (and/or directions) were made by the Appeal Panel

1 The Appeal is listed for a Call Over and Hearing of the Application for a Stay on 18 May 2022 at 9:30 AM. At that hearing, the issue of the appellant's standing to bring the appeal may also be determined.

A separate written notice of the Call Over and Hearing of the Application for a Stay will be sent to the parties.

2 On or before 09 May 2022 The Owners - Strata Plan No 79749 (APPELLANT) is to lodge with the Tribunal and give to the other parties any further evidence and submissions in support of the Application for a Stay by email. Such evidence and submissions is to include, but is not limited to, submissions as to the standing of Rory McCrudden to sign a Notice of Appeal on behalf of the Owners Corporation, given the decision of the Appeal Panel in *The Owners - Strata Plan 2010 v Kahn [2022] NSWCATAP 9*. The appellant is

also to serve a copy of the Notice of Appeal, these directions and its submissions in compliance with this direction on Realise Consulting Pty Ltd.

- 11 On 11 May 2022, the Appeal Panel amended the directions and orders made by the Tribunal on 28 April 2022 to extend the time for the Appellant's submissions and evidence to 16 May 2022. It also adjourned the hearing of 18 May 2022 to 25 May 2022. The final order made on 11 May 2022 was as follows:

The Tribunal will not order an ex-parte stay in the absence of the appellant addressing the issue of standing, particularly where the letter from Realise Consulting Pty Ltd to Regional Strata dated 5 May 2022 does not indicate that Realise Consulting Pty Ltd authorised, or has subsequently approved, the institution of the appeal for the purported appellant.

- 12 On 24 May 2022, the following orders (and/or directions) were made:
- 1 A hearing of the application to withdraw the appeal is dispensed with.
  - 2 The appeal has been withdrawn and is dismissed.
  - 3 The hearing listed on 25 May 2022 is vacated and parties are excused.
  - 4 Any application to set aside the decision at first instance should be made in the form of an application to set aside or vary decision lodged in the Tribunal's Consumer and Commercial Division. Any application to stay the decision pending determination of such application should be made concurrently in the Division.
- 13 On 26 May 2022, the Tribunal noted that the Respondents had applied for their costs of the appeal and timetabled the lodging of submissions and evidence from the parties in respect of this application. The Tribunal directed that the Respondents' submissions in support of the application for costs should address, but were not limited to, the specific order for costs which was sought.
- 14 The specific order for costs sought by the Respondents was for their costs of defending the appeal and stay applications as well as for their costs of applying for the appointment of a compulsory strata manager at first instance. The Respondents made it clear in their submissions in reply that they were seeking these costs orders on an indemnity basis against Mr McCrudden personally and not from the Appellant. However, in their submissions in chief, the Respondents said that they were seeking their first instance costs on a party/party basis and did not specify that they were seeking costs personally from Mr McCrudden.

15 This decision is our determination of the Respondents' application for their costs.

**Section 50(2) of the Civil and Administrative Tribunal Act – dispensing with a hearing**

16 Section 50(2) and (3) of the Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act) are as follows:

(2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.

(3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first—

(a) afforded the parties an opportunity to make submissions about the proposed order, and

(b) taken any such submissions into account.

17 The directions of the Tribunal of 26 May 2022 included the following:

The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course they should make submissions on this issue when complying with the directions as to their submissions on the substantive costs application.

18 The parties to the costs application in their written submissions did not oppose the making of an order dispensing with a hearing. We are satisfied that the issues for determination on the question of costs can be adequately determined in the absence of the parties by considering the parties' submissions and other material lodged with the Tribunal.

19 Accordingly, we will make an order dispensing with a hearing on this issue pursuant to s 50(2) of the NCAT Act.

**Submissions of the parties**

*Respondents' submissions*

20 The Respondents' written submissions consisted of 18 paragraphs. In paragraph 1 the Respondents submitted that paragraphs 3 to 16 were a re-statement of their initial application for costs at first instance, which is still undecided.

21 The Respondents accepted that under s 60 of the NCAT Act the Tribunal must be satisfied that there are special circumstances which justify the departure from the rule that each party bear its own costs.

22 In respect of seeking costs for the first instance hearing the Respondents put forward the following matters as justifying an order for costs:

- (1) The matters justifying the appointment of the compulsory manager summarised at [75]-[77] of the Tribunal's reasons (the Decision);
- (2) The fact that Mr McCrudden in his conduct of the proceedings on behalf of the Appellant (Respondent below) acted as the sole member of the executive committee of the Appellant;
- (3) The failure to provide access to documents in disregard of a Tribunal order;
- (4) The volume of material produced by the Appellant justified the involvement of lawyers to represent the Respondents;
- (5) "The "communication protocol" and litigation by-laws, with their chilling effect on the Respondents' lawful exercise of their right to participate in and control the actions of the Respondents, justify a detailed examination of whether they give rise to a special circumstance";
- (6) The Respondents had no avenue to advance and protect their rights as lot owners but to apply for a compulsory strata manager; and
- (7) The Appellant should have considered consenting to the orders sought based on its failure to obtain insurance. Such resistance was "unreasonable" and "doomed to fail".

23 The Respondents' submissions in chief in respect of a costs order in the stay application and appeal consisted solely of the following sentence:

Both the Stay Application and the Appeal would seem to have been initiated entirely by Mr Rory McCrudden under a misguided view that he still had a legal role to play after the appointment of a compulsory manager.

*Mr McCrudden's submissions*

24 Mr McCrudden made costs submissions in reply. He did so under his own name as 'owner unit 8'.

25 Mr McCrudden sought to have the Tribunal dismiss the application for costs on several grounds.

26 First, the costs application, by embracing costs of the withdrawn appeal, the undetermined stay application and the hearing at first instance, must be

dismissed because it is a mixture which cannot be dealt with. Such mixture is contrary to (non-compliant with) important NCAT regulations.

- 27 Secondly, the appeal was dismissed by consent and was not conditioned upon payment of costs.
- 28 Thirdly, an undetermined stay application is not amenable to a costs application in the Tribunal of first instance.
- 29 Fourthly, as to the appeal, the Appellant did not participate. The Respondents did nothing relevant in the appeal which was withdrawn immediately after legal advice relative to standing.
- 30 Fifthly, as to the hearing at first instance, the Respondents added to the costs by their own inefficiency. Examples of this inefficiency included introducing additional witnesses without leave, preparing over 460 pages of witnesses' statements, making false submissions to the Tribunal and erroneously complaining that a committee of one was illegal.
- 31 Sixthly, the quantum of \$20,000 for costs of the first instance proceedings is wholly without merit or evidence in support and fails to comply with regulations.
- 32 Seventhly, the assertion that Mr McCrudden was operating as the sole member of the executive committee is misleading. This implies autonomy when none existed nor indeed could exist. There was an election for the committee which was legally correct.
- 33 Finally, the withdrawal of the appeal on the basis of no locus standi confirms no legally constituted Appellant.
- 34 Mr McCrudden attached to his submissions additional insurance documents, an email to Mr Dunstan personally and part of a memorandum from the secretary of the Appellant 'to the extent that they may be relevant'.
- 35 In our view, these documents are not relevant to any issue relating to costs. Accordingly, we reject the tender of these documents on appeal.

*Respondents' submissions in reply*

- 36 In their submissions in reply the Respondents made the following submissions:

- (1) The Respondents seek costs not from the Appellant, being the Owners Corporation, but from Mr McCrudden personally. They also state that they seek their costs on an indemnity basis.
- (2) The Respondents dispute that the appeal was dismissed by consent. Rather, the Respondents submit that it was simply withdrawn by Mr McCrudden once the Tribunal drew to his attention relevant authority which identified his inability to bring the appeal proceedings. Further, the appeal was only withdrawn shortly before the hearing date for the stay application.
- (3) Costs were incurred in considering and preparing to meet the appeal and stay application including preparing submissions in response to the stay application.
- (4) Pursuant to s 60(4)(a) of the NCAT Act costs can be awarded against a non-party where such person is, by his conduct, the real party to the litigation.

### **Consideration**

37 In effect, before us are two applications for costs as follows:

- (1) The Respondents seek their costs of the hearing at first instance; and
- (2) The Respondents seek their costs of the appeal proceedings, including the abandoned stay application.

38 We will deal with each of these in turn.

#### *Application for costs of the hearing at first instance*

39 The Decision included directions for the parties to exchange costs submissions: at paragraphs [87]-[88]. No cost decision has yet been pronounced by the Tribunal at first instance. It is for the Respondents to follow this up in the Tribunal, including, if necessary, seeking an extension of time within which to file costs submissions.

40 The Appeal Panel in *The Owners – Strata Plan No 74835 v Pullicin (Costs)* [2020] NSWCATAP 49 at [9] stated:

These provisions [of the NCAT Act] give the Appeal Panel power to exercise functions, such as making a costs order, but only in relation to [the conduct or resolution of] the appeal proceedings. There was no decision about costs at first instance. The proceedings were adjourned, part heard. Consequently, despite our invitation for the parties to make submissions on the appropriate first instance costs order, the Appeal Panel does not have power to make such an order. Any outstanding issues relating to costs need to be determined by the Tribunal at first instance.



- 41 We have come to the same conclusion in respect of the Respondents' application for costs of the hearing before the Tribunal at first instance. We also conclude that this Appeal Panel does not have the power to make such an order.
- 42 Any outstanding application for costs needs to be determined by the Tribunal at first instance. Accordingly, we dismiss the application for costs incurred in respect of the proceedings at first instance.

*Costs of the appeal proceedings, including the application for a stay*

- 43 The application for costs is against Mr McCrudden, rather than the Appellant.
- 44 Under s 60(4)(a) of the NCAT Act, the Tribunal may determine 'by whom and to what extent costs are to be paid'. Similar provisions are found in the relevant legislation governing the award of costs in several of the jurisdictions of the courts in Australia such as s 98(1)(b) of the Civil Procedure Act 2005 (NSW).
- 45 It is settled law that such a provision empowers the courts to award costs against a non-party: see *Xabregas v Owners - Strata Plan No 79205 (Xabregas' case)*; *Moallem v Consumer Trader & Tenancy Tribunal (No2)* [2014] NSWSC 1027 at [71]-[74]. We accept that the similar provision at s 60(4)(a) of the NCAT Act also empowers the Tribunal to award costs against a non-party.
- 46 Mr McCrudden accepted, correctly in our view, that he had no standing to launch the Notice of Appeal or pursue the stay application in light of the orders at first instance: see *The Owners – Strata Plan 2010 v Khan* [2022] NSWCATAP 9 (*Khan's case*).
- 47 The principles governing the award of costs against a non-party were summarised by White J in *Xabregas' case* at [71]-[74] as follows

71 There is no issue that the power under s 98 of the *Civil Procedure Act* extends to the making of costs orders against non-parties. The power should only be exercised in exceptional circumstances, that is, outside the ordinary run of cases, and is to be exercised sparingly (*FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 at [210], [214]; *May v Christodoulou* [2011] NSWCA 75; (2011) NSWLR 462 at [11], [29]-[31], [93]).

72 In *Knight v FP Special Assets Limited* [1992] HCA 28; (1992) 174 CLR 178, Mason CJ and Deane J, with whom Gaudron J agreed on this matter, said (at 192-193):

*"The prima facie general principle is that an order for costs is only made against a party to the litigation ... there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awarding of costs, support an order for costs against a non-party ...*

*For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."*

73 In *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 the Full Court of the Federal Court said (at [103]):

"[103] In our opinion, the authorities establish, on the foregoing analysis, the following propositions:

A non-party costs order is exceptional relief, although some categories of factual situations are now recognised as within the discretion, for example, the situation described by Mason CJ and Deane J in *Knight* at 192 - 193. The width of the jurisdiction is illustrated by a recent English decision that there can be circumstances in which it would be appropriate to order costs in favour of a non-party against a party (see *Individual Homes v Macbrems Investments*, 23 October 2002, High Court of Justice Chancery Division at 8).

Whilst such an order is extraordinary, the categories of case are not closed, although in order to warrant its exercise, a sufficiently close connection, or as Gobbo J expressed it, a 'real and direct and ... material' connection with the principal litigation, must be demonstrated; in the words of Callinan J, the non-party can fairly be liable if adjudged by its conduct, to be a real party to the litigation, even if not the real party."

74 In *FPM Constructions v Council of the City of Blue Mountains*, Basten JA said (at [210]):

"... It is clear that the categories of case which may attract the exercise of the power are by no means closed, nor should they be. Nevertheless, the requirements of justice should not be allowed to expand an exception to the general rule, so as to undermine the rule itself. What is significant from a survey of the cases in which orders have been made against non-parties is that they tend to satisfy at least some, if not a majority, of the following criteria:

(a) the unsuccessful party to the proceedings was the moving party and not the defendant;

(b) the source of funds for the litigation was the non-party or its principal;

- (c) the conduct of the litigation was unreasonable or improper;
- (d) the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest, and
- (e) the unsuccessful party was insolvent or could otherwise be described as a person of straw."

- 48 We accept the general proposition that commencing proceedings on behalf of an entity without authority and hence without standing leads to the proceedings being wholly misconceived and without any prospects of success. In some circumstances this would be a special circumstance warranting an award of costs by the Tribunal against the non-party which commenced and pursued the proceedings without authority. However, for the reasons which follow, we have decided that Mr McCrudden's conduct does not amount to a special circumstance warranting an order for costs.
- 49 First, we note that the power to award costs orders against non-parties should only be exercised in exceptional circumstances, that is, outside the ordinary run of cases, and is to be exercised sparingly.
- 50 Secondly, Mr McCrudden withdrew pursuit of the appeal and the stay application at a very early stage of the appeal proceedings. Abandonment of proceedings or issues in proceedings by a self-represented litigant that do not have reasonable prospects at an early stage is to be encouraged.
- 51 Thirdly, we do not think in all of the circumstances before us that the conduct of Mr McCrudden can be described as 'unreasonable or improper'. Mr McCrudden acted without legal advice and sought a stay promptly eight days after the Decision. The desire to act promptly in seeking a stay is also to be encouraged and Mr McCrudden could reasonably have the view that such an application was urgent. We accept that it would be extremely difficult to obtain legal advice within this timeframe given that the Appellant was unrepresented in the proceedings at first instance.
- 52 Mr McCrudden commenced appeal proceedings no doubt believing that the order below did not prevent the officers of the Appellant having powers to act, at least to the limited extent of pursuing a stay of the Decision. A reading of the Appeal Panel's decision in *The Owners - Strata Plan 2010 v Khan* [2022]

NSWCATAP 9 demonstrates that this question is not without its complications and complexities. In our view it was not 'unreasonable or improper' for Mr McCrudden to have this view before obtaining legal advice.

53 Mr McCrudden withdrew the appeal once legal advice had been obtained and *Khan's case* was pointed out to him by the Tribunal. This demonstrates to us that Mr McCrudden was not acting in a manner that can be described as high-handed, unreasonable or improper in all of the circumstances.

54 Fourthly, there is no evidence before us to allow us to conclude that the quantum of costs in dispute is significant. In this regard, we have been provided with no assistance from the Respondents in terms of any evidence or specificity of the amount of legal work that has been undertaken by the Respondents. Whilst we accept some legal work was done up to the time of the withdrawal of the appeal, there are no documents on file that point to or indicate the extent of any such legal work done on behalf of the Respondents.

55 Further, we note that paragraph 79 of the NCAT Guideline on internal appeals dated 8 June 2022 states the following:

An application for costs should where possible be accompanied by a precise statement of the amount of costs actually sought and its components.

This may assist to avoid further costs being incurred in assessing any costs awarded.

56 In our view, based on the materials before us, it should have been possible for the Respondents to comply with the above guideline. This would have potentially allowed the Appeal Panel to avoid further costs being incurred in assessing any costs awarded.

57 Fifthly, there appears to be a factual dispute between the parties as to whether the appeal was withdrawn by consent or not. We are not in a position to determine this as neither party has put on any evidence and we do not know what submissions were made to the Appeal Panel when the appeal was withdrawn.

58 For the above reasons we refuse the Respondents' application for a personal costs order against Mr McCrudden in respect of the appeal proceedings.

## Orders

59 The orders of the Appeal Panel are as follows:

- (1) A hearing on the question of costs is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).
- (2) The Respondents' application for costs is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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